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**OCT 19 2004**

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of

Federal Communication Commission  
Bureau/Office

Amendment of Section 73.202(b)

MB Docket No. 04-318

Table of Allotments

FM Broadcast Stations

(Culebra, Puerto Rico)

**DOCKET FILE COPY ORIGINAL** No. - 11040

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**OCT 19 2004**

Federal Communications Commission  
Office of the Secretary

To: Assistant Chief, Audio Division  
Office of Broadcast License Policy  
Media Bureau

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**REPLY COMMENTS**

La Gigante Radio Corporation ("La Gigante"), permittee and operator by Special Temporary Authority ("STA") of Station WXZX-FM (the "Station"), by its counsel, hereby submits its Reply Comments in response to the Commission's Notice of Proposed Rule Making ("NPRM"), released August 12, 2004, DA 04-2500, in the above-referenced proceeding.

1. La Gigante's original Petition for Rule Making in this proceeding proposed the substitution of Channel 291A for Channel 254A at Culebra, which would enable La Gigante to obtain a permanent authorization for WXZX-FM, which it has been operating pursuant to special temporary authority ("STA") as Culebra's first local service for over six years.<sup>1</sup> To accommodate that channel change at Culebra, La Gigante initially proposed the deletion of the vacant allotment of Channel 291B at Vieques.<sup>2</sup>

<sup>1</sup> The circumstances requiring La Gigante to operate WXZX-FM pursuant to STA rather than a traditional FCC license are fully set forth in its initial Petition for Rule Making, which details the history of MM Docket 91-259. The allotments adopted in that proceeding in 1995 still have not been implemented.

<sup>2</sup> La Gigante believed that deletion of the vacant allotment at Vieques in favor of providing a channel for permanent authorization for Culebra's first local service was appropriate because (a) Vieques is already served by a full-time AM Station, WIVV, and (b) there is precedent for the deletion of vacant allotments generally when, as here, the station has never been constructed. See *Chatom and Grove Hill, Alabama*, DA 97-1170, released June 6, 1997

2. The NPRM took issue with La Gigante's proposed deletion of the vacant, unbuilt Vieques allotment, stating at paragraph 4 of the NPRM that if an expression of interest is shown in the vacant Vieques allotment at Channel 291B, then that vacant allotment would be retained for future auction. In that case, Petitioner's requested substitution of Channel 291A for Channel 254A at Culebra could not be granted.

3. Raul G. Rivera Menendez ("Menendez"), Aerco Broadcasting Corporation ("Aerco"), International Broadcasting Corporation ("IBC") and V.I. Stereo Communications Corporation ("V.I. Stereo", collectively with Menendez, Aerco and IBC known as the "Commenters") each filed comments expressing an interest in applying for the vacant Vieques allotment.<sup>3</sup>

4. After reviewing the NPRM, and anticipating that there would be expressions of interest for the Vieques allotment, La Gigante prepared and filed Comments that provided a means to preserve an allotment at Vieques/Isabel Segunda<sup>4</sup> while still allowing the channel change it requested at Culebra. In its Comments, La Gigante proposed, in addition to the substitution of Channel 291A for Channel 254A at Culebra, the substitution of Channel 254A for Channel 291B at Vieques/Isabel Segunda. Under the scenario La Gigante offered in its Comments, Culebra would have an allotment that would provide first local *permanently*

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<sup>3</sup> V.I. Stereo also argued that the allotment at Vieques is not really vacant. V.I. Stereo had an authorization to construct a station at the Vieques allotment but failed to construct before the permit expired. It appealed that decision but its Petition for Reconsideration was denied. V.I. Stereo then filed an Application for Review which remains pending before the FCC. V.I. Stereo cites no precedent for the position that its pending Application for Review somehow stays the effectiveness of the denial of the Petition for Reconsideration which affirmed the forfeiture of its right to construct the new facility on Channel 291B at Vieques. V.I. Stereo did not construct at Vieques when it had the opportunity. The expired permit was properly cancelled and that action was affirmed on reconsideration. Under these circumstances, there is nothing premature about La Gigante's Petition for Rule Making.

<sup>4</sup> As detailed more fully in its Comments, the island of Vieques is a municipio, while the community (or zona

*authorized* service to that community, and Vieques/Isabel Segunda would, in addition to full-time Station WIVV(AM), have Channel 254A as an FM allotment.<sup>5</sup>

### **DISCUSSION**

5. There are three possible outcomes in this proceeding. The Commission can elect to maintain the *status quo*, keeping Channel 254A at Culebra and Channel 291B at Vieques/Isabel Segunda (“Option I”). It could also adopt the proposal advanced in La Gigante’s Petition for Rule Making, and substitute Channel 291A for Channel 254A at Culebra while deleting the vacant Channel 291B allotment at Vieques (“Option II”). Finally, it could adopt the proposal advanced in La Gigante’s Comments and substitute Channel 291A for Channel 254A at Culebra and substitute Channel 254A for Channel 291B at Vieques (“Option III”). Option III should be adopted, as it retains first local service to the two communities involved, and advances the public interest by enabling La Gigante to obtain a permanent authorization for Culebra’s first local service.

6. Adopting Option I offers no public interest benefit. That option places the importance of retaining a vacant allotment over arranging the Table of Allotments to allow the licensing of a community’s first local service. The situation here is unique. Through no fault of its own, La Gigante has been unable to obtain a license to operate WXZX-FM on Channel 254A at Culebra. Instead, the station has served Culebra with first local service for nearly seven years through its STA on Channel 293A.<sup>6</sup> However, operation by STA is secondary to the operation of a licensed facility, so if a licensed facility were to file a minor modification application that

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urbana) of Vieques is commonly known as Isabel Segunda.

<sup>5</sup> The Vieques/Isabel Segunda allotment would have reference coordinates 18-08-34 N. Latitude and 65-18-22 W. Longitude on Channel 254A, and the Culebra allotment would have reference coordinates of 18-19 19 N Latitude and 65-17-59 W Longitude.

<sup>6</sup> This is the channel that was initially allotted to Culebra. The allotment was changed from Channel 293A to

caused interference to or received interference from the operation of WXZX-FM, La Gigante would have to adjust its operation, or even potentially take WXZX-FM off the air to accommodate the modification application of the licensed facility. WXZX-FM is a first local service that the residents have come to rely upon after seven years of operation.

7. By contrast, the Vieques allotment was made in 1995 by the Report and Order in MM Docket 91-259 at the request of V.I Stereo (see fn 6 for procedural history). It was never constructed, so the residents of Vieques have not come to rely on that particular service. Moreover, Vieques is already served by full-time AM Station WIVV.

8. Option I would ultimately deprive the residents of Culebra of their first local service in favor of the retention of a vacant allotment that might, at some undetermined point in the future, be the subject of a filing window that would allow interested persons to file applications for a construction permit for that allotment. Option I cannot be viewed as the most preferential arrangement of the Table of Allotments.

9. Option II would allow La Gigante to obtain a permanent authorization for WXZX-FM, but it would delete the vacant allotment at Vieques. While there is ample precedent to support such an action by the Commission,<sup>7</sup> of the three options, this option is not the option that provides the most preferential arrangement of allotments.

10. Adopting Option III would provide the best result under the FM allotment priorities.<sup>8</sup> It allows La Gigante to obtain a permanent authorization for WXZX-FM on Channel 291A and allows for the retention of an FM allotment (Channel 254A) at Vieques/Isabel Segunda. The vacant allotment at Isabel Segunda/Vieques would be downgraded from a Class B

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Channel 254A in the Report and Order in MM Docket 91-259 10 FCC Rcd 6673 (1995), recon. denied, 11 FCC Rcd 16392 (1996), app. for rev. denied (FCC 99-147, released June 21, 1999).

<sup>7</sup> *Chatom and Grove Hill, Alabama*, DA 97-1170, released June 6, 1997.

to a Class A. However, the public interest benefit in permanently licensing WXZX-FM on Channel 291A at Culebra so that the station can continue to provide first local service that the residents have come to rely upon outweighs retaining a vacant Class B allotment that does not even represent a first local service to the community of Vieques.

11. This case is similar to the *Bethel Springs, Tennessee* case.<sup>9</sup> In that case, a vacant allotment was downgraded to enable the reallocation, upgrade and change in community of license of an existing station which would, upon adoption of the rulemaking proposal, provide first local service to the new community of license. The Commission concluded that downgrading the vacant allotment was appropriate because the public interest benefit of providing a first local service outweighed downgrading the channel. Even though the downgraded facility would serve considerably less population, the Commission reasoned that the downgrade would not result in an actual loss of service because the channel was vacant. The Commission also pointed out that the downgraded allotment would still provide service to the proposed community of license.<sup>10</sup>

12. The public interest considerations here are the same as those in *Bethel Springs*. Downgrading the vacant Vieques/Santa Isabel allotment will allow for a permanently licensed first local service to Culebra. The Vieques/Santa Isabel allotment is vacant, and thus, there will be no actual loss of service, and the downgraded allotment will provide city grade service to the community of license (i.e., Vieques/Santa Isabel).<sup>11</sup>

13. Option III presents the most preferential arrangement of allotments, and the

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<sup>8</sup> *Revision of FM Assignment Policies and Procedures*, 90 FCC2d 88 (1982)

<sup>9</sup> 17 FCC Rcd 14472 (2002)

<sup>10</sup> *Id.* at ¶15.

<sup>11</sup> The Commenters all expressed an interest in applying for the vacant Vieques/Santa Isabel allotment, but none specifically stated that they would apply only if the allotment was a Class B. Also, none stated that they would

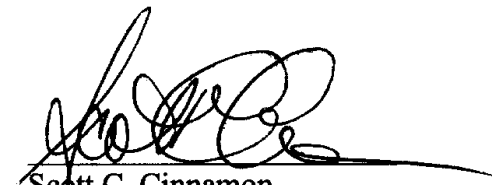
changes to the Table of Allotments necessary to implement Option III are technically and legally feasible. It will allow the permanent authorization of first local service in Culebra and keep a vacant allotment at Vieques/Santa Isabel.

WHEREFORE, La Gigante respectfully requests that the Commission substitute Channel 291A for Channel 254A at Culebra so that Petitioner can obtain a permanent authorization for its operation of Station WXXZ-FM which presently provides first local service to Culebra, and substitute Channel 254A for Channel 291B at Vieques and correct the community of license to Santa Isabel.

Respectfully submitted,

**LA GIGANTE RADIO CORPORATION**

By:



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October 19, 2004

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apply if the allotment was downgraded to a Class A. If the downgrade is approved, La Gigante states that it has a present intention to file an application to construct a new station on Channel 254A at Vieques/Santa Isabel.

## **TECHNICAL COMMENTS**

**MB Docket No. 04-318**

**RM No. 11040**

**Channel 291A – 106.1 MHz**

**Culebra, Puerto Rico**

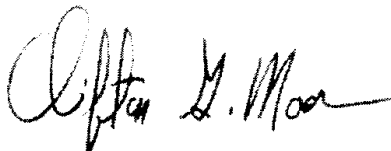
**October 2004**

These comments are filed on behalf of La Giagante Radio Corporation in support of MB Docket No. 04-318, RM No. 11014. This docket seeks to amend the FM Table of Allotments by substituting Channel 291A for the currently allotted 254A at Culebra, Puerto Rico as well as substituting 254A at Isabel Segunda/Vieques, Puerto Rico for the presently allotted 291B.

The substitution of 254A at Isabel Segunda/Vieques for 291B creates a loss area. Most of the loss area is ocean. The remaining loss area is served by more than five services. The following three exhibits indicate five FM stations covering each of the loss areas. The first exhibit indicates loss area on the island of Puerto Rico, the second on the islands of St. Thomas and St. John and the third exhibit shows the loss area on the tip of the island of St. Croix.

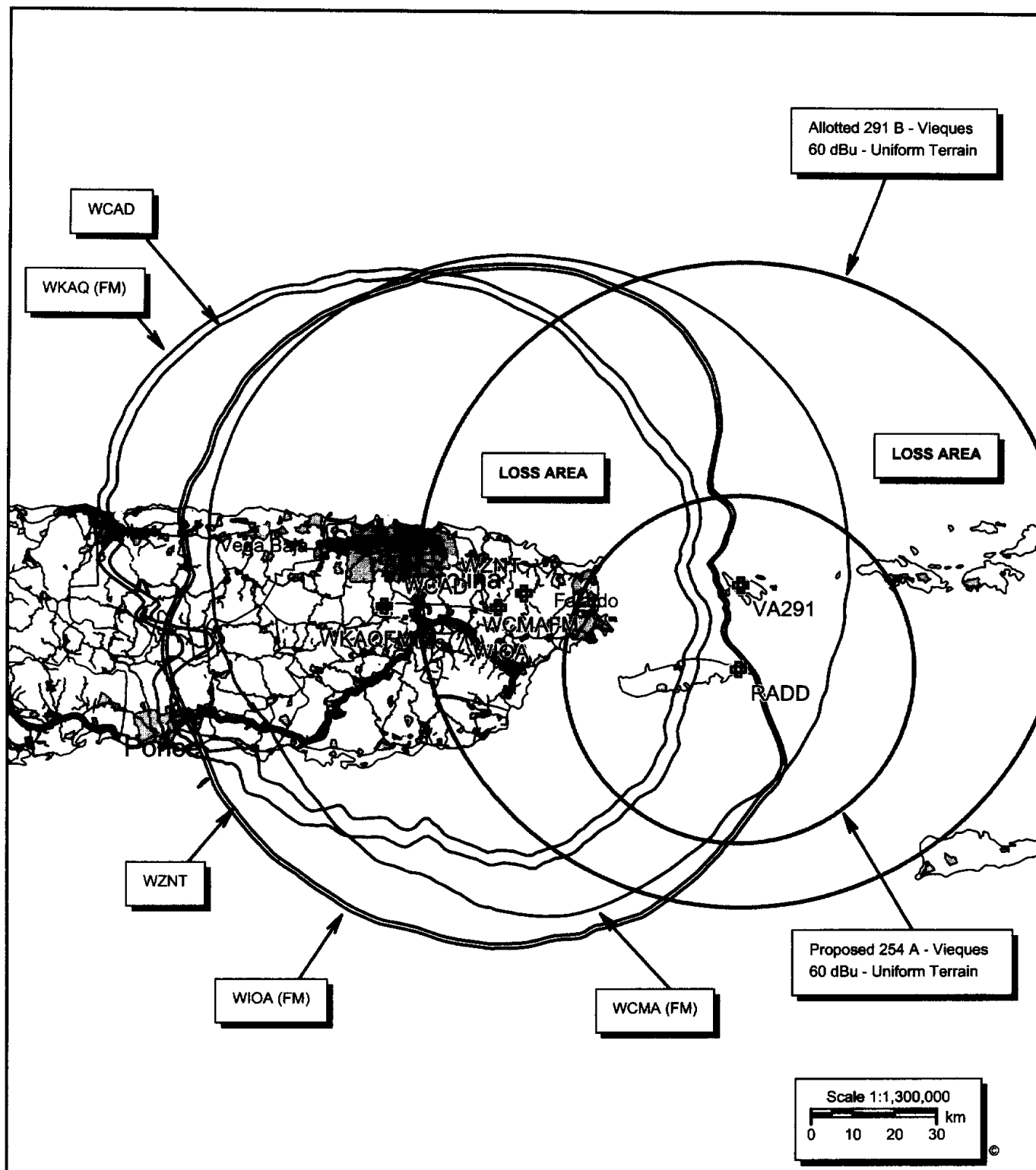
While the exhibits show only five services, in all cases there are more aural services to the loss area that could have been drawn, both FM and AM.

All information contained herein is thought to be true and correct to the knowledge of the undersigned.



Clifton G. Moor  
Bromo Communications, Inc.

October 19, 2004



### Services to Loss Area (West)

MB Docket No. 04-318

RM No. - 11040

291A - 106.1 MHz

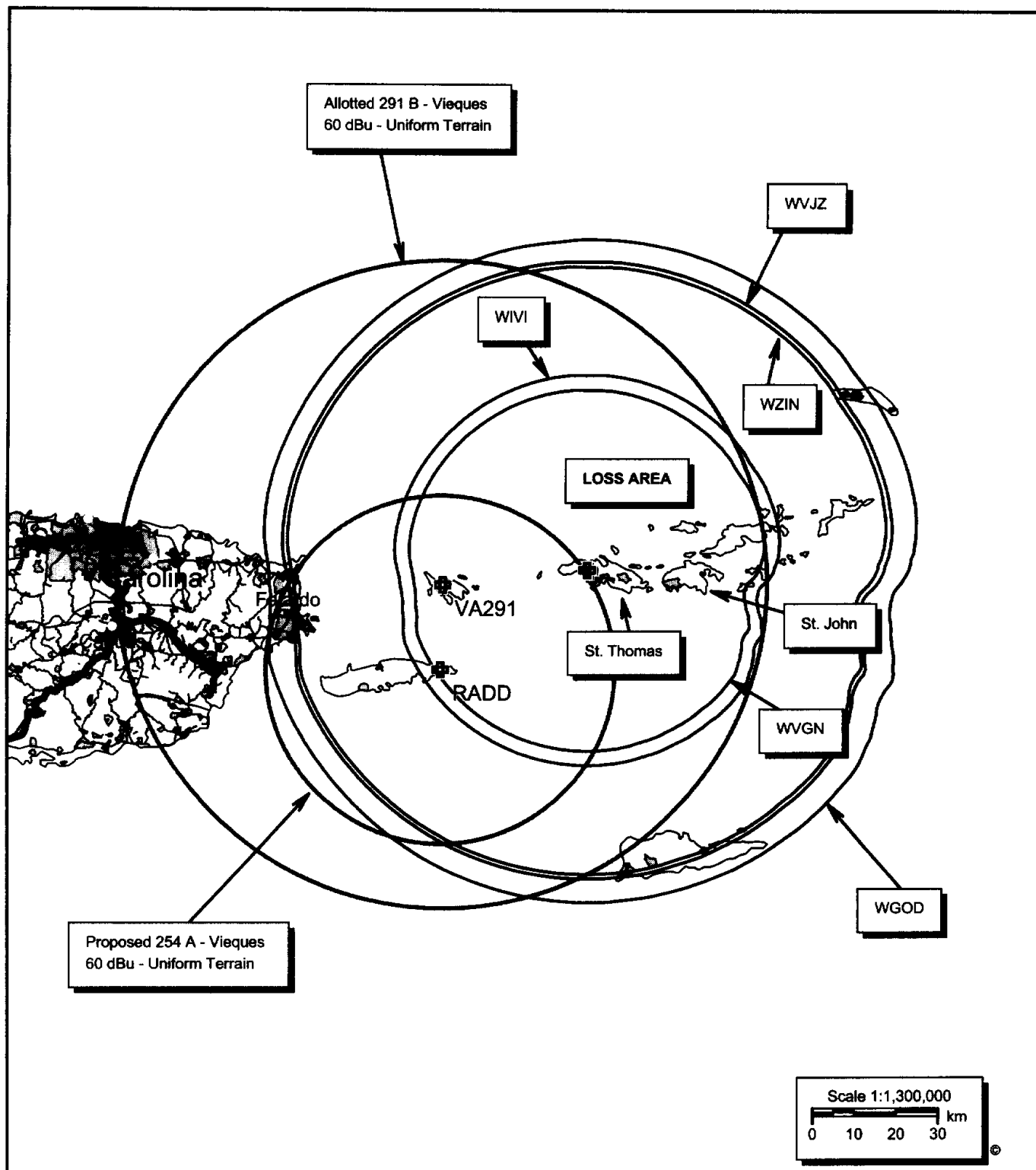
Culebra, Puerto Rico

**Bromo Communications, Inc.**

Atlanta, Georgia

October 2004





### Services to Loss Area (East)

MB Docket No. 04-318

RM No. - 11040

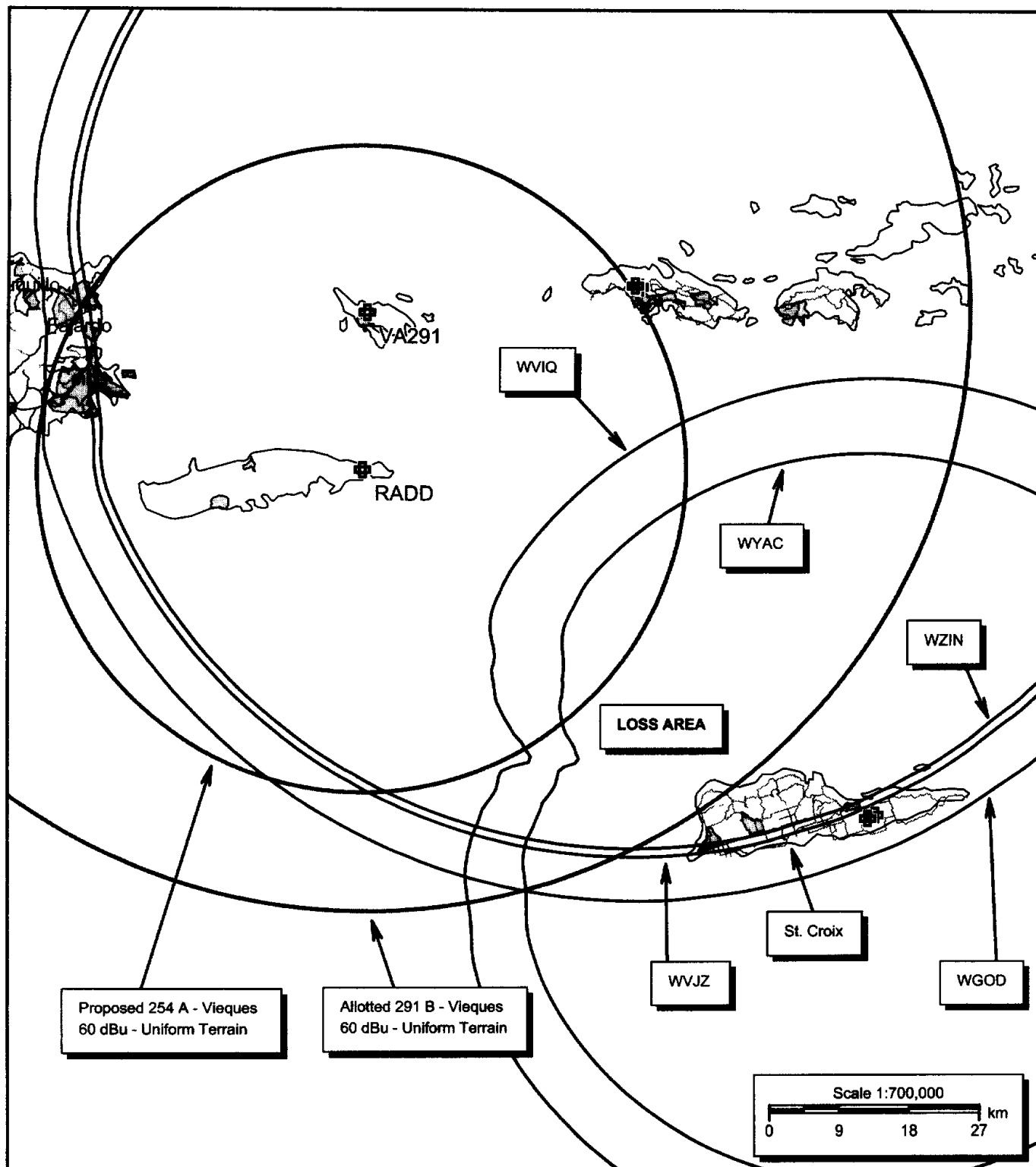
291A - 106.1 MHZ

Culebra, Puerto Rico

**Bromo Communications, Inc.**

Atlanta, Georgia

October 2004



### Services to Loss Area (South)

MB Docket No. 04-318

RM No. - 11040

291A - 106.1 MHZ

Culebra, Puerto Rico

**Bromo Communications, Inc.**

Atlanta, Georgia

October 2004

**CERTIFICATE OF SERVICE**

I, Scott C. Cinnamon, do certify that I have on this 19th day of October, 2004, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Comments" to the following:

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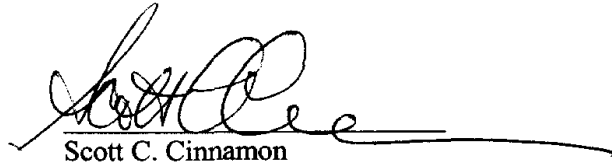
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